his evidence he regarded himself as the owner of "*exclusively* the second floor right to the top of the seventh storey including the roof top". It is this attitude as the exclusive owner regardless of the water system supplying the building which led him without consulting the respondents to start making alterations of the building. This high handed action naturally provoked the respondents into hardened attitude of insisting upon their rights. The conduct of both parties provide a good example of how people living in one building should not behave. The conduct of the parties aside, we do not think that we should agree to the issue of mandatory injunction in view of the fact that facilities of the Gaya Hotel are available to the respondents, and we therefore quash the order of the court below as to the issue of mandatory injunction.

There remains now for us to deal with the award of $10,000 damages by the learned trial judge against the appellant. We do not see any basis for this award anywhere either discussed or stated in the learned judge's long judgment. Such a high award of damages in our judgment is not justified. There is no case here for awarding exemplary damages as it does not fall under any of the three rules laid down by Lord Devlin in *Rookes* v. *Barnard*[20] at 1226-1228. Instead, damages in this case should be estimated with reference to the amount of money (a) which will be required to release the appellant from obligation to keep open and maintain the staircase (*Wrotham Park Estate* v. *Parkside Home, supra*); or (b) by which the value of the respondents' property is diminished because of loss of right to use the staircase to go up to the roof top; or (c) which will be required to construct a new water tank to supply water to the respondents' floors in place of the one on the roof top to which he could not have access by the staircase. Whatever amount is estimated is not going to be precise, and at best only an approximate one. If $16,000 is required to be expended for restoring the staircase whilst access to the roof top is available by means of staircase and lift of Gaya Hotel, and such access is not utilised as often as once a week, in our view damages could be adequately assessed with reference to inconvenience caused to the respondents for losing the direct route. We therefore make the following orders:—

(1) the mandatory injunction issued by the court below is quashed;

(2) access to the roof top of the commercial building shall now be granted by the appellant and his successors in title to the respondents and their successors in title by staircase and lift of the adjoining Gaya Hotel, unless they decide between themselves to be otherwise;

(3) damages of $5,000 shall be paid to the respondents.

For the reasons given and subject to the above orders, we dismiss the appeal with costs here and in the court below. Deposit should be paid to the respondents on account of taxed costs.

*Appeal dismissed.*

Solicitors: *Yap & Chin; Shelly Yap & Co.*

## HING KIM PONG v. TEO ENG JIN

**[F.C. (Lee Hun Hoe C.J. (Borneo)) July 12 & 16, 1979]**
**[Kuching — Federal Court Civil Appeal No. 107 of 1979]**

*Land Law — Caveat — Caveat removed — Application for stay refused — Sarawak Land Code (Cap. 81), ss. 132, 173 & 177.*

*Practice and Procedure — Caveat removed by order of court — Application for stay refused — Discretion of trial judge.*

In this case the appellant and the respondent had participated in a joint venture in the course of which certain lands had been acquired. Subsequently the property was divided between the parties. After this was done, the respondent managed to get the relevant authority to cancel a road reserve so that he was able to get another lot of land for commercial and industrial purposes. The appellant claimed that he was entitled to a final account taking into account the lot of land. He filed a caveat against the lot but the respondent obtained an order for the removal of the caveat. The appellant appealed against this order and also applied for stay of execution but stay of execution was refused. He appealed against this refusal.

**Held:** stay of execution was a matter within the discretion of the trial judge and unless it was shown that the learned judge had exercised his discretion wrongly, an appellate court would be slow to interfere. The learned judge was justified in refusing stay as it was clear the appellant was more interested in getting monetary payment and the question whether he was entitled to a share in the lot would have to be thrashed out at the hearing of the suit which was only initiated after the caveat was ordered to be removed.

*Cases referred to:-*

(1) *Serangoon Garden Estate Ltd.* v. *Ang Keng* [1953] M.L.J. 116.

(2) *Lee Pek Choo* v. *Ang Guan Yaw* [1975] 2 M.L.J. 146.

(3) *Staples* v. *Corby* (1901) 19 N.Z.L.R. 539.

(4) *Polini* v. *Gray* (1879-80) 12 Ch. D. 438.

(5) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212, 214.

FEDERAL COURT.

*Ee Poh Teck* for the appellant.

*Matthew Chan* for the respondent.

*Cur. Adv. Vult.*

**Lee Hun Hoe C.J. (Borneo):** Respondent ("the caveatee") is the registered proprietor of certain land at Padungan, Kuching, described as "sub-lot 4" being part of Lot 10 Section 9 Kuching Town Land District. On September 29, 1978 appellant ("the caveator") lodged a caveat claiming to be entitled to or beneficially interested in "sub-lot 4". The caveatee succeeded in obtaining an order on April 21, 1979 from the High Court under section 177 of the Land Code (Cap. 81) for the removal of the caveat. There is an appeal against the decision of the learned judge. The caveator's application for stay of execution was refused. Hence the notice of motion.

It is the contention of appellant that he has satisfied the learned judge of two factors, namely, permanent deprivation and merit, yet stay was refused. He cited *Serangoon Garden Estate Ltd.* v. *Ang Keng*[1] in support. In granting a stay of execution in a possession case it was held that the granting of a stay of execution, though discretionary, should be exercised on correct principles. The fact that the defendant cannot be restored to his original position as a tenant if his appeal succeeds is not sufficient ground. It

might be an important factor to be taken into consideration if there were other grounds, for example, that there were merits in the appeal.

The learned judge referred to the statutory declaration made by the caveator in support of lodgment of the caveat and came to the conclusion that there was nothing in writing to show any resulting trust. Clearly, the learned judge considered himself bound by *Lee Pek Choo* v. *Ang Guan Yaw & Anor.*[2] The contention of appellant is that if that case rested solely on the Statute of Frauds, 1677 the decision is wrong. The reason is that section 7 of the Statute of Frauds has been repealed and replaced by section 53(1) of the Law of Property Act, 1925. Therefore, in 1925 the Statute of Frauds did not contain a section requiring a resulting trust to be in writing.

Further, appellant submitted that stay ought to be granted on ground of "special circumstances" in the present case. *Staples* v. *Corby*[3] a New Zealand case based on a decision of the Privy Council in *Polini* v. *Gray*[4] was cited for the proposition that once "special circumstances" were shown to exist stay ought to be granted.

It was not until February 13, 1979 that appellant initiated action (Civil Suit No. K.60/79) pertaining to the caveat by filing the first writ claiming for capital contribution of joint venture. The second writ was filed on February 27, 1979 claiming for a sum of $133,000 in Civil Suit No. K.82/79. The third writ was filed on June 21, 1979 claiming for a declaration as to half share in the land in Civil Suit No. K.289/79. This was done after the order for removal was made. Also, the writ has not as yet been served. The learned judge very properly pointed out the fact that up to the date of hearing the caveator had not taken any action to enforce his claim.

On the other hand, it is the contention of respondent that the learned judge has unfettered discretion to grant a stay or not as long as he exercises his discretion judicially. He submitted that the appellate court should not interfere. *Halsbury's* Laws of England, 3rd Edition, Volume 17, paragraph 455, page 272 under the heading Grounds on which stay is granted states: —

"The court has an absolute and unfettered discretion as to the granting or refusing of a stay, and as to the terms upon which it will grant it, and will, as a rule, only grant a stay if there are special circumstances, which must be deposed to on affidavit unless the application is made at the hearing."

It was said that appellant had not shown special circumstances. What he had shown would fit any other case as well. It must be remembered the application in this case is concerned with section 177 of the Land Code which not only provides a summary procedure for removal of caveat but also a way for speedy determination by the court. The question of proprietary right is involved. The lodgment of the caveat amounts to a deprivation of such right. If the learned judge deemed fit to remove the caveat then grant of stay of execution ought not to be allowed as it affects proprietary right. Any delay resulting from stay would cause irreparable damage to respondent. This is supported by two affidavits — one of respondent and the other of Mr. Ting Lieng Poh who is interested in the property. Respondent merely applied for removal of caveat and had not claimed damages. Nothing in the affidavit of appellant goes to show irreparable damages.

On the question of merits of appeal respondent submitted that whatever the learned judge might have said about trust was based on his interpretation of the statutory declaration made by appellant in support of the caveat. The main point is that the statutory declaration has not established a caveatable interest to the satisfaction of the learned judge. Thus, at page 169 of the Appeal Record he said in his judgment that: —

"It seems to me that the respondent is concerned only with 'money accounting' and that he is not claiming any interest in sublot 4 of Lot 10. Support for this view may be found in Civil Suit No. K. 60/79 where the respondent sues the applicant for alleged capital contribution to the joint venture in the sum of $78,500. Although there are some grounds for the alleged claim of resulting trust in sublot 4 or Lot 10. The grounds stated in the statutory declaration are either vague and/or ambiguous."

Paragraph 11 of the statutory declaration states: —

"On various occasions after the said relevant transfers I did approach the said TEO ENG JIN to request and demand him to give or render a final account of our said joint venture and partnership especially in respect of the said sublot 4 which I understand quite lately that the sublot 4 has been approved for commercial/industrial purpose but he still fails or refuses to do so."

It is the contention of respondent that appellant cannot use other materials to bolster up his case but he must rely only on the statutory declaration. The two civil suits filed in February 1979 involve monetary claims. The suit for declaration for half share in land was filed after the removal order was made. In any case it has not yet been served on respondent. This suit, it was submitted, was filed merely to bolster up the claim of appellant for stay of execution as the caveat was lodged in September 1978.

Whether the learned judge was right or not to order the removal of the caveat is not for determination. It will be decided at the proper place and proper time. No doubt if his order refusing stay is upheld the question whether he was right or not to order removal of the caveat would probably be of academic interest only.

If I may venture to say so, by reading the relevant affidavits and the statutory declaration, I get the impression that the joint venture had ended with the division of the property after respondent was unable to get the owner of adjoining Lot 6, section 9, Kuching Town Land District to jointly apply for subdivision. Had he agreed to do so respondent and appellant would get seven instead of six sub-lots from their land, that is, Lots 10 and 11. As it was appellant and respondent agreed on June 5, 1978 that three lots 204, 205 and 206 were to go to appellant and Lots 1, 2, 3 and 4 were to go to respondent. Up to that time appellant was aware that in respect of Lots 10 and 11 only three sub-lots could be approved because of the requirement of sub-lot 4 as a road reserve. However, respondent, for reasons only known to him alone, managed to get the authority to reverse the decision on road reserve and instead to approve sub-lot 4 for

commercial/industrial purpose. It was after this that appellant asked respondent for final account claiming that respondent had agreed to settle the matter if he could get approval for sub-lot 4. It is for appellant to prove at the proper time and place that joint venture and partnership have not been discharged or rescinded despite the agreement to the division of property.

One of the principal objects of the Torrens system of land registration and conveyancing is to ensure certainty of title to land and registrable interests in land. The Sarawak Land Code is based on the Torrens system. Section 132 protects the title of a registered proprietor by making it indefeasible except in cases of fraud, forgery or illegality. However, a *bona fide* purchaser for value can, even in such cases, deal safely with the registered proprietor and will acquire from him an indefeasible registered title.

Section 173 permits the entry of a caveat by any person who claims to be entitled to or beneficially interested in the land. Until the caveat is removed the registered proprietor cannot dispose of his land. Our system of private caveats is a substitution for the equitable doctrine of notice in the English land law. As Lord Diplock said in *Eng Mee Yong & Ors.* v. *V. Letchumanan*[5]: —

"This is a very grave curtailment of the rights of the proprietor, yet it can be imposed at the instance of anyone who makes a claim to title to the land, however baseless that claim may turn out to be."

A little later he compared a caveat with a statutory injunction in these words: —

"The caveat under the Torrens system has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with the land pending the determination by the court of the caveator's claim to title to the land, in an ordinary action brought by the caveator against the caveatee for that purpose."

He pointed out: —

"... that this issue of a caveat differs from the grant of an interlocutory injunction in that it is issued *ex parte* by the Registrar acting in an administrative capacity without the intervention of the court and is wholly unsupported by any evidence at all. Unless there were some speedy procedure open to the registered proprietor to get the caveat set aside in cases where the caveator's claim is baseless or frivolous or vexatious, the Torrens system of land registration and conveyancing, so far from giving certainty to title to land in Malaya, would leave the registered proprietor in a more precarious position as respects his powers of disposition of his land than an unregistered proprietor under English law."

Although Lord Diplock was dealing with the National Land Code what he said applies equally to the Sarawak Land Code.

The learned judge was, in my view, justified in refusing stay as the caveator was more interested in getting monetary payment after learning that the caveatee managed to get approval for sub-lot 4 for commercial/industrial purposes. Moreover, they had agreed to the division of the lots between them. Whether the caveator has a share in sub-lot 4 is not a matter to be decided on affidavits. This will have to be thrashed out at the hearing of the suit which was only initiated after the caveat was ordered to be removed.

The allegation made by the caveator does not show a relationship of vendor and purchaser. It is not a case of the vendor refusing to complete a contract for sale of the land. Here, the caveatee was interested to dispose of the land to a developer. But, the caveator wanted to prevent such disposal unless he could get some money. I cannot see how the caveatee would be willing to sell the land below market value. If the caveator can establish the continuance of the joint venture and partnership he will get his money. He has not satisfied the learned judge of his claim to an interest in property. Even if he has so satisfied the learned judge he has not shown on the balance of convenience it would be better to maintain the *status quo* until trial of the suit for declaration that he is entitled to a half share in the land. On the hearing of the application there seemed to be conflicting evidence. The learned judge very properly did not try to attempt to resolve the conflict of evidence on affidavits. Unless it has been shown that the learned judge has exercised his discretion wrongly under section 177 of the Land Code, an appellate court would be slow to interfere since in dealing with this matter opinions of individual judges may reasonably differ. I can see no reason to interfere with the exercise of the discretion by the learned judge in refusing stay. I would dismiss the application with costs.

*Application dismissed.*

Solicitors: *Ee & Lim; Chan, Jugah, Wan Ullok & Co.*

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## NG CHEE KEONG v. NG TEONG KIAT HIGHLANDS PLANTATIONS LIMITED

**[O.C.J. (Mohamed Azmi J.) January 4, 1979]**
**[Kuala Lumpur — Originating Motion No. 96 of 1977]**

*Company Law — Oppression by majority shareholders — Affairs of company conducted in oppressive manner — Neglect of tea plantation — Application by minority shareholders for sale of plantation — Companies Act (Act 125), s. 181(1).*

In this case the facts showed that the directors of the company had neglected the tea plantation belonging to the company and, because of failure to pay the quit rent, there was the danger of the land being forfeited to the State. The minority shareholders applied under section 181(1)(a) of the Companies Act and obtained an order that the respondent-company do accept a written offer for the purchase of the tea estate in the event of the respondent-company failing to enter into the written sale and purchase agreement, the Senior Assistant Registrar be authorised to enter into such agreement on behalf of the respondent-company. The respondent-company thereupon applied that the order be set aside and that the notice of motion be struck off.

**Held:** (1) in view of the indifferent attitude of the Board of Directors and the company in allowing the tea plantation to deteriorate from a profitable concern to one of near insolvency, together with their conduct in allowing the tea plantation to be in arrears of quit rent to such an extent that the land has almost forfeited to the State, it was clearly established that the affairs of the company were being conducted in an oppressive manner;

(2) the applicants' application came within the ambit of section 181(1)(a) of the Companies Act and having regard to the wide powers given to the court under section 181(1)(b) the orders made were fair and reasonable having regard to the circumstances of the case;

(3) the application under section 181 was rightly made by motion under Order 52 of the Rules of the Supreme Court.